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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1245

APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN.

JOHN C. TOOLE, JOSEPH R. APPLEGATE, RAYMOND DIX, CLARENCE M. McARTHUR, J. BAIN McGILVRAY, GORDON B. SULLIVAN, HENRY STRUIK, MILFORD GOLDEN, MORRIS L. BOTWIN, ERNEST R. RICE, PLYN EARLE, WILLIAM K. MEADE, JOSEPH FORBES, ABRAHAM C. LANE, WILLIAM G. ZIEVE, IRVING E. GORDON, SAMUEL CROWELL (CROLL), SAMUEL T. WINSHALL, HORACE L. DIAMOND, CURTIS C. BUSH, IRVING C. RIFKIN AND MILO D. RATHBUN,

Plaintiffs and Appellants,

vs.

MICHIGAN STATE BOARD OF DENTISTRY, HARRY T. WOOD, CHARLES BARIBEAU, BOYD KELLEY, JAMES F. SPENCER, WILLIAM J. B. MASON, G. G. JACOBS AND MICHIGAN STATE DENTAL SOCIETY,

Defendants and Appellees.

JURISDICTIONAL STATEMENT.

Jurisdiction of the Supreme Court of the United States to review the decision of the Supreme Court of the State of Michigan is predicated upon Section 237 of the Judicial

Code, as amended, providing for a review of the Supreme Court of the United States by Writ of Error where the validity of a law of the state or an ordinance of a municipality of the state is sustained by the highest court of that state, and upon 28 U. S. C. A. Section 861a, abolishing writs of error and substituting therefor the remedy of appeal, and 28 U. S. C. A. section 861b, making the former procedure under a writ of error applicable to the appeal provided by section 861a.

This appeal involves the question of the validity, under Article XVII, Sec. 3, Article II, Sections 3 and 16, Article IV, Sections 1 and 2 of the Constitution of the State of Michigan, and the so-called privileges and immunities clause, the due process and equal protection of the law clause of the 14th Amendment to the Constitution of the United States, of Act 122 of the Public Acts of the State of Michigan for the year 1939, approved by the Governor of the State of Michigan on May 19, 1939, and being entitled "An Act to regulate the practice of dentistry and dental surgery; to provide for the examination, licensing, registration and regulation of persons who may practice the same; to provide for the disposition of moneys received under this act; to provide for penalties for violation of this act; and to repeal certain acts and parts of acts."

All the plaintiffs and appellants are and have been for many years duly registered and licensed dentists under the laws of the State of Michigan and own and operate one or more dental offices in the city of Detroit, County of Wayne, and in other cities and counties in the State of Michigan, and in some instances the plaintiffs own and operate dental offices in more than one city and county in the state.

The individual defendants constitute the membership of the Michigan State Board of Dentistry and such Board is vested with administration of the statutes of the State

of Michigan pertaining to the regulation of the practice of dentistry and dental surgery and the examination, licensing, registration and regulation of persons desiring to practice dentistry and dental surgery in the state of Michigan.

Each of the plaintiffs has invested many thousands of dollars in instruments, supplies, equipment, and in the outfitting and furnishing of offices for the purpose of carrying on the practice of dentistry and dental surgery and receive many thousands of dollars annually as income from the practice of dentistry and dental surgery in said offices. By reason of the high quality of dental services performed and the reasonable charges made therefor, there has become attached to the practice of dentistry and dental surgery by the plaintiffs a valuable good will, and unless the relief prayed for herein be granted, each of the plaintiffs will suffer a great and irreparable loss and damage.

At the 1939 session of the Legislature of the State of Michigan there was passed an act known as Act No. 122, approved by the Governor on May 10, 1939, being entitled, "An Act to regulate the practice of dentistry and dental surgery; to provide for the examination, licensing, registration, and regulation of persons who may practice the same; to provide for the disposition of moneys received under this Act; to provide for penalties for violations of this Act; and to repeal certain Acts and parts of Acts." Within ninety days after the final adjournment of the 1939 Legislature, there was filed with the Secretary of State of the State of Michigan duly certified petitions signed by qualified electors equal in number to more than five percent of the total vote cast for all candidates for Governor at the November 1938 election, asking that said Act 122, Public Acts 1939, be submitted to the electors for approval or rejection pursuant to the referendum provision in Article V, Section 1 of the Constitution of the State of Michigan. Pursuant to such petition, the Secretary of

State did submit the question of approval or rejection of said Act 122 at the general election held in the State on November 5, 1940. It is provided by said Article V, Section 1, of the Constitution that such Act shall not go into effect until and unless approved by a majority of the qualified electors voting thereon.

It is provided by Article XVII, Section 3 of the Constitution of the State of Michigan:

> "Sec. 3. All proposed amendments to the constitution submitted to the electors shall be punished in full, with any existing provisions of the constitution which would be altered or abrogated thereby, and a copy thereof shall be posted at each registration and election place. Proposed amendments shall also be printed together with any other special questions to be submitted at such election in full on a single ballot separate from the ballot containing the names of candidates or nominees for public office."

Accordingly, it is required by the Constitution that said Act 122 should be submitted at such referendum election by the printing of said Act in full on a single ballot. In the case of the submission of said Act 122 at the November 5, 1940 election, in voting precincts throughout the state where paper ballots were used, said Act 122 was not printed on a single ballot but was included upon a ballot upon which three other proposals were printed, contrary to the provisions of Article XVII, Section 3 of the Constitution. In all of the voting precincts in the following places throughout the State of Michigan, voting machines were used exclusively at such election and in each instance the electors were required to vote for and against the adoption of said Act 122 by the use of voting machines only, and no paper ballots were there used. In none of the places where voting machines were used as ballots was said Act 122 printed in full upon the ballot and in lieu thereof un-

fair and misleading condensed statements purporting to represent the substance of said Act were placed on or in the vicinity of the machines so used, contrary to the aforesaid constitutional provision. Plaintiffs charge the fact to be that the aforesaid constitutional provisions is mandatory and that neither the legislature nor any election official have any power or jurisdiction to substitute any other method or means than that provided in the Constitution, and that in view of such constitutional provisions, the use of voting machines without having the Act stated in full thereon is wholly illegal and all votes so cast are void and of no effect. And plaintiffs, therefore, charge the fact to be that the question of the adoption or rejection of said Act 122 has never been validly or legally submitted to a vote of the electorate throughout the State of Michigan as required by the Constitution, in that in voting precincts, wherein a total of upwards of 200,000 votes were cast, voting machines were used exclusively as aforesaid. That voting machines were so used exclusively, without containing therein the text in full of said Act 122, and without the use of any paper ballots whatsoever, in the following places: the cities of Saginaw, Owosso, Mt. Clemens, East Detroit, Royal Oak, Birmingham, Lansing, Jackson, Battle Creek, Grand Rapids, Muskegon, Muskegon Heights, North Muskegon, Ironwood, Wakefield and Dearborn; and also in Saginaw Township in Saginaw County, Battle Creek Township in Calhoun County, and Norton Township in Muskegon County.

Throughout the State of Michigan at such election there were cast approximately 1,250,000 votes for and against the adoption of said Act 122, and, as heretofore stated, in voting precincts throughout the State wherein upwards of 200,000 votes were cast for and against the adoption of such Act, voting machines were used exclusively and the requirements of Article XVII, Section 3, of the Constitu-

tion of the State of Michigan requiring each such question to be printed in full and on a single ballot were wholly uncomplied with, and plaintiffs, therefore charge that the question of the adoption or rejection of said Act 122 was never properly, duly or legally submitted to the electorate of the State of Michigan nor legally approved by such electorate notwithstanding that the returns purport to show that the vote for adoption of said Act was approximately 735,000 and that for rejection was approximately 515,000 votes. And the plaintiffs charge that by reason of the requirements of Article V, Section 1, of the Constitution providing that no Act shall go into effect until and unless approved by a majority of the qualified electors voting thereon, said Act cannot and has not legally gone into effect and that it will be necessary in order to comply with the mandatory requirements of the Constitution of this state, that the question of adoption or rejection of such Act be validly voted on at the next succeeding general election, and that in the meantime in accordance with such constitutional provisions, said Act is not now in effect and cannot ever come into effect unless and until approved by a majority of the qualified electors voting thereon at the next succeeding general election.

Upon information and belief, that in many of the voting precincts in the city of Detroit at such election, the paper ballots containing the question of the adoption or rejection of said Act 122, together with three other proposals printed thereon, were not furnished to the voters at the opening of the polls and were not so furnished until later in the day subsequent to the time when many thousands of voters in said city had already cast their ballot and as a result thereof thousands of voters in the city of Detroit were disenfranchised and were thereby prevented from voting for or against the approval of said Act 122, and plaintiffs, therefore, charge the fact to be that, aside from the ques-

tion of invalidity of such submission by reason of the printing of four proposals on one ballot contrary to Article XVII, Section 3, of the Constitution as aforesaid, there was no valid and legal submission of the question of the adoption or rejection of said Act 122 at said general election as contemplated and required by the Constitution of this State, and for this reason also said Act should be held not to have been legally submitted or approved by the voters at the election held on November 5, 1940.

In the alternative, in case it be held that said Act was validly submitted and approved at such election, plaintiffs charge that said Act 122 is unreasonable, oppressive, unjust, discriminatory, arbitrary, and capricious, and unconstitutional and void as in contravention of the following provisions of the Constitution of the United States and of the Constitution of the State of Michigan:

> "Section 1. The powers of government are divided into three departments: The legislative, executive, and judicial.
>
> "Section 2. No person belonging to one department shall exercise the powers properly belonging to another, except in the cases expressly provided in this Constitution."

Article IV, Sections 1 and 2, Michigan Constitution.

> "Section 2. The Chief executive power is vested in the Governor."

Article IV, Sections 1 and 2, Michigan Constitution.

> "Section 4. Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of such right, and no law shall be passed to restrain or abridge the liberty of speech or of the press."
>
> "Sec. 16. No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law.

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Constitution of the United States 14th Amendment.

Section 1 of said Act 122 provides that, "The Governor shall annually hereafter appoint one member of said Board, and shall fill any vacancies for an unexpired term, by appointment from a list of three licensed dentists recommended to him by the Michigan State Dental Society." Plaintiffs show that the passage of said Act 122 by the 1939 Legislature was under the sponsorship of the Michigan State Dental Society which is an organization of various practicing dentists throughout the State of Michigan, the purported purpose of which is to elevate the standards of governing the practice of dentistry and dental surgery in the State of Michigan but one of its unavowed purposes is to regulate and control the practice of dentistry in the State of Michigan and to elevate the prices and charges made upon the members of the public for dental services and to prevent members of the public from becoming cognizant that dental prices and charges made by many dentists are grossly expensive and exorbitant. Said provision of Section 1 is unconstitutional as in violation of Article IV, Sections 1 and 2, and of Article VI, Section 2, of the Michigan Constitution, as aforesaid, in that it restricts or limits the appointing power of the governor as chief executive of the State by preventing him from appointing as a member of said board any person who is not first recommended to him by the Michigan State Dental Society, and

provides a means whereby a relatively few private citizens are empowered virtually to dictate and direct the appointment and the personnel of said board, and thereby to regulate and control the execution of the dental law in such manner as they may see fit. Plaintiffs are and have been for many years in advertising, by way of newspapers, radio and otherwise, the services which they are equipped to render to the general public, and to inform the general public as to the prices which they charge, and to furnish public information as to modern advances in the methods of dentistry and dental surgery. The members of the Michigan State Dental Society profess to believe that such advertising is unethical and improper, and for many years there has been a controversy existing between the members of the Michigan State Dental Society and the Modern Dental Society of Michigan composed of dentists who so advertise, and by virtue of the aforesaid provision in Section 1 of said Act, the Michigan State Dental Society will be enabled to dictate the appointment of members of the defendant board and to have control of the execution of the dental law, and thereby unreasonably and oppressively to regulate and control the practice by plaintiffs of their profession as dentists.

Section 5 of said Act 122 provides that:

> "Every applicant for examination must be a citizen of the United States, or have declared his intention of becoming such. In cases where the applicant has declared his intention of becoming a citizen, but has not completed his qualifications for citizenship, a temporary license may be issued for the duration of the minimum time required to complete citizenship. Upon completion of the requirement for citizenship, the board may issue a regular license without further examination."

Plaintiffs charge that said provision is unconstitutional and void as in contravention of the due process of law, the privi-

leges and immunities, and the equal protection of the law clauses of Section 1 of the 14th Amendment to the Constitution of the United States, in that by reason of such constitutional provision the legislature has no power to restrict the issuance of dental licenses to citizens of the United States if they be otherwise qualified to receive such licenses.

Section 8 of said Act provides that—

> "No dentist shall announce or hold himself out to the public as limiting his practice to, or as being especially qualified in, or as giving special attention to, any branch of dentistry, without first having obtained a license therefor from the Board as hereinafter provided."

Plaintiffs show that said clause is not limited to one who purports to have merely special qualifications to engage in a particular branch of dentistry but is so broad as to include any who may wish to limit their practice or to give special attention to a particular branch of dentistry; and plaintiffs charge that said provision is unreasonable, arbitrary, and capricious, and in violation of the due process, privileges and immunities, and equal protection of the law clauses of the 14th Amendment to the Constitution, and not justified under the so-called police power of the legislature. Said section further requires that in order to so announce or hold himself out as limiting his practice to or giving special attention to a particular branch of dentistry, the dentist must, in addition to passing an examination given by the board, show that he has had a minimum of one year of post-graduate work in the particular branch of dentistry concerned, and that such provision is likewise arbitrary, unreasonable, and capricious, and unconstitutional for the same reasons.

Section 13 of said Act provides that:

> "The practice of dentistry by students in dental colleges or colleges approved by the Board when acting

> under the direction and supervision of registered and licensed dentists acting as instructors, or practice of dentistry by licensed dentists of other states or counties at meetings of the Michigan State Dental Society, or competent parts thereof, alumni meetings of dental colleges, or any other like dental organizations, while appearing as clinicians,"

are exempted from the operation of the Act. That said provisions are unconstitutional and void as comprising an unreasonable classification and a discrimination not founded upon reasonable and logical distinction, in that it permits dentists selected by the Michigan State Dental Society to perform dental work upon members of the public, which dentists, who are not members of said society, are not permitted to perform upon members of the public likewise, and said Act thereby unfairly and unreasonably discriminates in favor of the Michigan State Dental Society and against dentists such as plaintiffs who are members of the Modern Dental Society and not members of Michigan State Dental Society.

Section 14 of said Act provides that any person "who places in the possession of an operator, assistant or other agent such dental material or equipment as may be necessary for the management of a dental office on the basis of a lease or any other agreement for compensation for the use of such material, equipment or office, or who retains the ownership or control of dental material, equipment or office and makes the same available in any manner for use by operators, assistants or other agents," shall be deemed to be a manager, proprietor, operator or conductor as used in said Act. Said provision is arbitrary and unreasonable and acts to deprive plaintiffs and others of due process of law, of the privileges and immunities, and of the equal protection of the law guaranteed to them by Section 1 of the 14th Amendment of the Constitution of

the United States, and is likewise void as in violation of Article II, Section 9 of the Constitution of the State of Michigan forbidding the passage of a law impairing the obligation of contracts. Such provision would prohibit the bona fide leasing or renting of a dental office and the equipment and materials therein even though the lessor received only legitimate rent therefor and had no other direct or indirect connection with the ownership or operation of the business carried on therein.

Section 16 of said Act provides that,—

> "No person or persons shall own, or be financially interested in, or manage more than one office for the practice of dentistry in any location or locations and operate them under his or their own name with employed operators. No dentist or dentists shall be associated or connected with in any manner any offices or rooms where the profession of dentistry is practiced unless such dentist or dentists shall be actually engaged in the major portion of their time in the practice of dentistry at such office or room,"

with provision that the dentist may, after obtaining approval of the Board, spend some days of a week in one location other than the location of his principal office. Said provision being one purporting to prevent the ownership and operation of branch office has no legitimate concern or connection with the public health, safety or morals and is a wholly unnecessary, unreasonable and arbitrary restriction upon the legitimate carrying on of the practice of dentistry and is in violation of the due process clause of Article II, section 16 of the Constitution of the State of Michigan and of the due process, privileges and immunities, and equal protection of the law clauses of Section 1 of the 14th Amendment to the Constitution of the United States. Plaintiffs further charge that the provision of such paragraph purporting to vest in the board absolute power to

approve or disapprove of the division of a dentists' time and attention to two locations only on different days of the week is likewise arbitrary and purports to vest in the board the unrestrained power to grant or withhold such right notwithstanding that no standard or standards are set forth in the law by which to govern the board in the exercise of such discretion.

Section 17 of said Act purports to make it unlawful, among other things, to circulate any statement or statements as to the skill or method of practicing dentistry of any dentist through any media, means, agencies, or devices of any advertising nature, to advertise professional superiority or the performance of professional services in a superior manner; to advertise price, cost, charge, fee or terms of credit for professional services, or for materials used in the practice of dentistry, or comparative values thereof; to advertise bargains, cutrates, or special values in dental service or production with or without specifying the time they shall apply; to advertise any free dental work or free examinations; to advertise to perform any dental operation painlessly, regardless of the fact that some dental operations may be performed painlessly; to advertise by any means, the using of any secret anesthetic, drug, formula, medicine, method or system; to advertise by means of large display signs or glaring light signs, electric or Neon, or such signs containing as part thereof the representation of a tooth, teeth, bridge work, plates or teeth or any portion of the human head, or use specimens of such in display, directing the attention of the public to any such person or persons engaged in the practice of dentistry; to advertise artificial teeth, bridge work or dentures by the use of any representation of a tooth, teeth, bridge work or denture, or of any portion of the human head, or advertised dental plates or restorations, or the materials used in their construction, under any fictitious, misleading, fancy or un-

scientific name. By said provision, vitually all advertising, except such as may by defendant board be construed to constitute a so-called professional card giving the dentist's name, degree, office location, hours, et cetera, is not merely regulated but is absolutely prohibited notwithstanding that such prohibition is not reasonably necessary or even advisable from the point of view of the public health, safety or morals. Such provisions would prevent legitimate, honest and fair dissemination of information as to the services rendered by dentists and the prices charged therefor as well as information as to the most modern, advanced methods of performing dental work. Plaintiffs charge that said provisions are unreasonable, arbitrary, and not only not in the public interest but are contrary to the public interest in that persons needing or desiring dental treatment are entitled to be informed by fair and truthful advertising as to the price, cost and charges as well as terms of credit, where given, which they must pay for such services; and said provisions are, therefore, in violation of the due process clause of Article II, Section 16, Article II, Section 9, prohibiting impairment of contracts, as well as of the free speech provisions in Article II, Section 4 of the Constitution of the State of Michigan; and also in violation of the due process, the privileges and immunities, and the equal protection of the law clauses of Section 1 of the 14th Amendment to the Constitution of the United States. Plaintiffs further charge that the provisions of said Section 17 are for the same reasons unconstitutional by reason of the fact that such section purports to prohibit any and all advertising by means of radio of every kind and nature inasmuch as the provisions purporting to permit public announcement by way of newspaper or professional cards impliedly prohibit all radio advertising regardless of its fairness and truth.

Plaintiffs further show that defendants have attempted

to adopt a certain rule affecting the practice of dentistry, which said rule is purportedly based upon the said invalid act of the legislature, namely Act 122, P. A. 1939, and which said rule defendants threaten, have attempted, and are attempting to enforce and put into effect, and which said rule is as follows:

> "No dentist or dentists shall operate under his or their names, or be financially interested in the operation of, any office or rooms, where dental work is done, unless such dentist or dentists shall be actually engaged in the practice of dentistry for the major portion of their time at such office or rooms, provided, however, that the provisions of this rule shall not apply where a licensed dentist, with the approval of the Board shall choose to practice dentistry under his own name, one or more days of a given week in one location other than the location of his principal office."

Plaintiffs show that said rule interferes with and prevents plaintiffs from carrying on their ordinary practice of their profession under existing laws, and further that no authority exists in law for the adoption of said rule, and the adoption of said rule constitutes an attempt to legislate on the part of defendant State Board of Dentistry and is contrary to and in violation of Article IV, Sections 1 and 2, of the Constitution of the State of Michigan; but plaintiffs greatly fear that defendants will enforce the same unless restrained by the injunction of this Court.

Plaintiffs further allege that defendants are in the same way adopting, attempting to adopt, and threatening to adopt other rules and regulations designed to interfere with plaintiffs in the ordinary and lawful practice of their profession aforesaid, amounting to attempts to legislate in violation of Article IV, Sections 1 and 2, of the Constitution of the State of Michigan and contrary to the rights of plaintiffs;

and plaintiffs fear that they will enforce same unless restrained by the injunction of this Court.

By other provisions of said Act, the defendant Board is authorized and empowered to suspend for a limited period or to revoke the license of any dentist violating any of the provisions of such Act. Plaintiffs show that the defendant Board has threatened to require plaintiffs to comply with all the provisions of said Act on and after December 10, 1940, and plaintiffs charge that, unless restrained by order of this Court, the defendants will institute or cause to be instituted proceedings directed toward the suspension or revocation of their licenses to engage in the practice of dentistry in the State of Michigan and will cause to be instituted criminal prosecutions against the plaintiffs based upon alleged violations of the various provisions of said Act, notwithstanding that, as aforesaid, said Act has never been validly approved under the referendum provisions of the Constitution of this State, and notwithstanding that, as aforesaid, the said Act is wholly unconstitutional and void.

As to the Federal questions presented, these appellants charge that the act of the legislature of the State of Michigan complained of contravenes the 14th Amendment to the Constitution of the United States in the following particulars:

(a) Section 5 of said Act is contrary to the provisions of the 14th Amendment as restricting the issuance of licenses to practice dentistry to others than citizens of the United States, even though they be otherwise qualified to receive such licenses.

(b) Section 8 of said Act contravenes the said 14th Amendment in that it is not limited to one who purports to have very special qualifications to engage in a particular branch of dentistry but is so broad as to include any who may wish to limit their practice or to give special attention

to a particular branch of dentistry; and appellants charge that said provision is unreasonable, arbitrary and capricious.

(c) Section 14 of said Act is contrary to the provisions of the said 14th Amendment because it would prohibit the bona fide leasing or renting of a dental office and equipment and materials therein even though the lessor received only legitimate rent therefor, and had no other direct or indirect connection with the ownership or operation of the business carried on therein.

(d) Section 16 of said Act contravenes the said 14th Amendment in that it purports to prevent the ownership and operation of branch offices and has no legitimate concern or connection with the public health, safety or morals and is wholly unnecessary, unreasonable and arbitrary as a restriction upon the legitimate carrying on of the practice of dentistry, and that it purports to vest in the dental board absolute power to approve or disapprove of the division of a dentist's time and attention in two locations only on different days of the week and is arbitrary in that no standard or standards are set forth in the law by which to govern the board in the exercise of such discretion.

The foregoing provisions of the Act are set forth in full above.

The trial court, being the Circuit Court for the County of Wayne, State of Michigan, overruled all of the contentions of plaintiffs. The Supreme Court of the State of Michigan sustained the trial court on all points.

The foregoing contentions of unconstitutionality were saved for review by appropriate assignments of error.

It is contended that the Supreme Court of the United States has jurisdiction to review the decision of the Supreme Court of the State of Michigan on appeal on the basis of

a decision in the Supreme Court of the United States in the cases of:

Baltimore & Ohio Railroad Co. v. *Maryland*, 21 Wall. 456, 22 Law Ed. 678;

Capital City Dairy Co. v. *Ohio*, 183 U. S. 238, 46 Law Ed. 171; 22 Sup. Ct. Rep. 120;

Sully v. *American National Bank*, 178 U. S. 289, 44 Law Ed. 1072; 20 Sup. Ct. Rep. 935.

These cases involve review by this Court of decisions of a Supreme Court of a State in a case where the validity of a State statute was drawn in question as repugnant to the Federal Constitution that the decision below was made in favor of its validity.

A copy of the decision of the Supreme Court of the State of Michigan rendered in this cause January 5, 1942, is attached hereto marked "Exhibit A". The final decree based thereon was entered February 19, 1942.

Such decision was rendered January 5, 1942. Application for rehearing thereof was denied February 11, 1942. The application for allowance of an appeal therefrom to the Supreme Court of the United States is presented contemporaneously with this statement.

EDWARD N. BARNARD,
Attorney for Appellants.

Dated February 27, 1942.

EXHIBIT "A".

STATE OF MICHIGAN, SUPREME COURT

JOHN C. TOOLE, et al., *Plaintiffs-Appellants,*

WILLIAM G. ZIEVE, et al., *Intervening Plaintiffs-Appellants,*

vs.

MICHIGAN STATE BOARD OF DENTISTRY, et al., *Defendants-Appellees,*

MICHIGAN STATE DENTAL SOCIETY, *Intervening Defendant-Appellee.*

Before the Entire Bench.

WIEST, *J.:*

In the interest of public health, safety and welfare of the people of this State, the legislature, by Act No. 122, Pub. Acts 1939, regulated the practice of dentistry and dental surgery, provided for the examination, licensing, registration and regulation of persons who may practice the same and, to accomplish that end, created a State Board of dentistry, fixed its membership and defined its powers and duties. The act is long, contains 23 sections, and covers upward of 10 printed pages. Plaintiffs are registered and licensed dentists, own and operate dental offices and filed the bill herein to have the act adjudged inoperative for the reasons hereinafter stated and discussed. Upon hearing in the circuit court the act was adjudged valid and the bill dismissed. Review is by appeal.

Under referendum procedure, fixed by provisions in the Constitution, the act was required to be submitted to the voters of the State for approval or rejection at the November election, 1940. In precincts voting by paper ballot the act was printed thereon in full, preceded by the question of approval or disapproval. In precincts using voting machines there was used on the machines the following proposal prepared by the Secretary of State:

"YES NO Referendum on Act No. 122 of the Public Acts of 1939, being 'An Act to regulate the practice

of dentistry and dental surgery; and to repeal certain acts and parts of acts."

"An Act to regulate the practice of dentistry and dental surgery; to provide for the examination, licensing, registration and regulation of persons who may practice the same; to provide for the disposition of moneys received under this act; to provide penalties for violation of this act, and to repeal certain acts and parts of acts.

"Shall said Act No. 122 of the Public Acts of 1939 be approved?"

A full printed copy of the act was posted in each polling place.

At the election 1,251,650 votes were cast; 735,053 for approval of the act, and 516,597 against approval, or a majority of 218,456 in favor of approval. The votes on the machines totaled 156,202, of which 84,870 approved the act, and 71,332 disapproved. Thus it appears that the act was approved by a majority of unquestioned ballots.

Plaintiffs claim the act was not legally submitted to the voters under the referendum provisions of the Constitution, Art. 17, Sec. 3, in the ballots used on the voting machines.

The provision in the Constitution providing for referdum of acts of the legislature, Art. 5, Sec. 1, at the time of the submission in this instance, required that "The text of all measures to be submitted shall be published as constitutional amendments are required by law to be published."

Art. 17, Sec. 3, of the Constitution, at the time of the referendum, provided:

"All proposed amendments to the constitution submitted to the electors shall be published in full, with any existing provisions of the constitution which would be altered or abrogated thereby, and a copy thereof shall be posted at each registration and election place. Proposed amendments shall also be printed together with any other special questions to be submitted at such election in full on a single ballot separate from the ballot containing the names of candidates or nominees for public office."

These provisions regulating procedure under the initiative referendum and special questions clearly stated essentials accompanying submission, and this continued until the subsequent amendment to Art. 17, Sec. 3, of the Constitution, effective May 7, 1941, which now reads:

"All proposed amendments to the constitution and other questions to be submitted to the electors shall be published in full, with any existing provisions of the constitution which would be altered or abrogated thereby, and a copy thereof shall be posted in each polling place. The purpose of any such proposed amendment or question shall be designated on the ballots for submission to the electors in not more than 100 words, exclusive of caption. Such designation and caption shall be prepared by the secretary of state or by such other authority as shall be hereafter designated by law within 10 days after the filing of any proposal and shall consist of a true and impartial statement of the purpose of the amendment or question in such language as shall create no prejudice for or against such proposal."

This, of course, did not have retroactive effect, and the ballot prepared for use on the voting machines did not comply with the then command of the Constitution.

Does the mistake of the election officials, in not complying with the letter of the law in preparing the ballot for use on voting machines, render the election void when it appears that the ballots cast on the machines in no respect affect the result?

In People ex rel. Hartwick *v.* Avery, 102 Mich. 572, it was held:

"The electors are not to be deprived of the result of their votes at an election by the mistake of election officers, when it does not appear to have changed the result."

See also People *v.* Cicott, 16 Mich. 282; Attorney General *v.* Miller, 266 Mich. 127.

In State Dental Society *v.* Secretary of State, 294 Mich. 503, involving the referendum petitions relative to this same act, we held, in a per curiam added to the opinion prepared by the late Justice Potter, that since there were

sufficient valid signatures remaining after the exclusion of invalid ones, the measure could be submitted to the electorate.

Assuming that the referendum votes in the precincts using machines were void, nevertheless valid votes were cast in all other precincts which resulted in approval of the act by a majority of all electors voting thereon.

Among the constitutional questions raised is that pertaining to the language of the act limiting appointment by the governor. This portion of section 1 reads:

"The governor shall annually hereafter appoint 1 member of said board, and shall fill any vacancy for an unexpired term, by appointment from a list of 3 licensed dentists recommended to him by the Michigan state dental society."

It is urged that under the rule promulgated in Milk Marketing Board *v.* Johnson, 295 Mich. 644, such limitation is fatally defective.

However, the act under consideration contains a saving clause, which reads:

"Sec. 22. This act is declared to be severable, and should any word, phrase, sentence, provision or section hereof be hereafter declared unconstitutional or otherwise invalid, the remainder of this act shall not thereby be affected, but shall remain valid and in full force and effect for all intents and purposes."

Excision of the provision relative to appointments would not invalidate the act nor render it inoperative for without it the governor has power to make the necessary appointments.

The claim that the act violates the free speech section of the Constitution (Art. 2, Sec. 4), and the due process section (Art. 2, Sec. 16), as well as the Fourteenth Amendment to the Constitution of the United States, is fully answered in Semler *v.* Oregon State Board of Dental Examiners, 294 U. S. 608, and People *v.* Carroll, 274 Mich. 451.

We find no merit in the appeal and the decree in the circuit court is affirmed. A public question being involved there will be no costs.

Bert D. Chandler, Emerson R. Boyles, Walter H. North, Raymond W. Starr, Henry M. Butzel, George E. Bushnell, Edward M. Sharpe, concurred with Wiest, J.

STATE OF MICHIGAN, SUPREME COURT

JOHN C. TOOLE, et al., *Plaintiffs-Appellants*, WILLIAM G. ZIEVE, et al., *Intervening Plaintiffs-Appellants*,

v.

MICHIGAN STATE BOARD OF DENTISTRY, et al., *Defendants-Appellees*, Michigan State Dental Society, *Intervening Defendant-Appellee.*

Before the Entire Bench.

BOYLES, *J.:*

I concur in the result reached by Mr. Justice Wiest. However, I do not agree with the reasoning on the question concerning appointments by the governor, that the constitutionality of the dentistry act (Act No. 122, Pub. Acts 1939) as to that issue can be upheld merely because the act contains a "saving or severance" provision. The so-called milk marketing act (Act No. 146, Pub. Acts 1939) contained the same saving provision, yet that act was held by a majority of this court to be void in its entirety because of its provisions for appointment of the board. Milk Marketing Board *v.* Johnson, 295 Mich. 644. However, there is an essential difference between the two acts which, in my opinion, saves the dentistry act. In the latter, the act itself continues present members of the dentistry board in office until the expiration of term, requires the governor to make an annual appointment thereafter, and merely requires that the governor "shall fill any vacancy for an unexpired term, by appointment from a list of 3 licensed dentists recommended him by the Michigan State

dental society." The act creating the milk marketing board, in express terms designates the members of the board: "2 shall be milk producers * * * 1 shall be a distributor * * *." Thus, the act itself expressly directs that a majority of the board shall consist of members who have a direct pecuniary interest in the matters submitted to them, much of which relates directly to the financial interest of the members themselves and the divergent interests of the groups from which the act itself requires them to be selected. For the above reason, the provision requiring the governor to fill vacancies from a list recommended by the State dental society, in the dentistry act, is directory; the provision in the milk marketing act was held by this court to be mandatory, and void. Because of this essential difference between the two acts, and not because of the saving clause in the dentistry act, the latter act should be held constitutional.

Bert D. Chandler, Walter H. North, Raymond W. Starr, Henry M. Butzel, Edward M. Sharpe, concurred with Boyles, J.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1245

JOHN C. TOOLE, JOSEPH R. APPLEGATE, RAYMOND DIX, ET AL.,

Appellants,

vs.

MICHIGAN STATE BOARD OF DENTISTRY, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

HERBERT J. RUSHTON,
Attorney General of Michigan,
EDMUND E. SHEPHERD,
Solicitor General of Michigan,
Counsel for Michigan State Board of Dentistry;
WILBER M. BRUCKER,
ROBERT A. SULLIVAN,
Counsel for Michigan State Dental Society.

CLARK, KLEIN, BRUCKER & WAPLES,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1245

JOHN C. TOOLE, JOSEPH R. APPLEGATE, RAYMOND DIX, CLARENCE M. McARTHUR, J. BAIN McGILVRAY, GORDON B. SULLIVAN, HENRY STRUIK, MILFORD GOLDEN, MORRIS L. BOTWIN, ERNEST R. RICE, PLYN EARLE, WILLIAM K. MEADE, JOSEPH FORBES, ABRAHAM C. LANE, WILLIAM G. ZIEVE, IRVING E. GORDON, SAMUEL CROWELL (CROLL), SAMUEL T. WINSHALL, HORACE L. DIAMOND, CURTIS C. BUSH, IRVING C. RIFKIN, AND MILO D. RATHBUN,

Plaintiffs & Appellants,

vs.

MICHIGAN STATE BOARD OF DENTISTRY, HARRY T. WOOD, CHARLES BARIBEAU, BOYD KELLEY, JAMES F. SPENCER, WILLIAM J. B. MASON AND G. G. JACOBS, AND MICHIGAN STATE DENTAL SOCIETY,

Defendants & Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN.

COUNTER-JURISDICTIONAL STATEMENT.

Appellants have filed an appeal from the decision of the Michigan Supreme Court in the case of *Toole et al.* v. *Michigan State Board of Dentistry et al.* (1942), 300 Mich. 180.

Jurisdiction for this Court is claimed under Section 237 of the Judicial Code as amended.

This appeal involves Act No. 122 of the Michigan Public Acts of 1939, being "An Act to regulate the practice of dentistry and dental surgery; to provide for the examination, licensing, registration and regulation of persons who may practice the same; to provide for the disposition of all moneys received under this act; to provide penalties for violations of this act; and to repeal certain acts and parts of acts."

Act No. 122 was passed by the Michigan legislature, signed by the Governor and was to have become effective on September 29, 1939. Before the effective date of the act appellants, representing a small minority of dentists (less than 1% of the dentists in the State of Michigan), were responsible for the filing of petitions requesting a referendum. The question of approval or rejection of the act was duly submitted to the voters at the general election held on November 5, 1940, and it was overwhelmingly approved by the people.[1]

After the referendum, appellants filed a Bill of Complaint in the Circuit Court for the County of Wayne, State of Michigan, setting forth in this bill that the act had not been validly submitted under Section 3 of Article 17 of the Michigan State Constitution; that certain sections of the act were contrary to specified provisions of the Michigan Constitution; that the act was outside the police power of the State; and that the act violated Section 1 of the 14th Amendment of the Constitution of the United States.

On July 30, 1941, the Circuit Court concluded that the act had been validly submitted to referendum and approved

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[1] The vote was 735,053 in favor of adoption and 516,597 against adoption of the act, or a majority of 218,456.

by a majority of the voters; that it was constitutional as being within the police power of the State to promote and protect the public health, safety and general welfare of the people of the State of Michigan; and that the act did not conflict with Section 1 of the 14th Amendment to the Constitution of the United States.

An appeal was taken by appellants to the Michigan Supreme Court, appellants questioning the act on substantially the same legal grounds as they had advanced in the Circuit Court. On January 5, 1942, the Michigan Supreme Court sustained the constitutionality of the act. In so far as the act was questioned on the ground that it violated due process of law under the United States Constitution, the court unanimously sustained the act and held:

> "The claim that the act violates the free speech section of the Constitution (1908), article 2, § 4, and the due process section, article 2, § 16, as well as the Fourteenth Amendment to the Constitution of the United States, is fully answered in Semler *v.* Oregon State Board of Dental Examiners, 294 U. S. 608 (55 Sup. Ct. 570, 79 L. Ed. 1086), and People *v.* Carroll, 274 Mich. 451."

A Petition for Re-hearing was filed by appellants. It was denied by the Michigan Supreme Court on February 17, 1942. A Motion for Reconsideration of the denial was likewise filed and denied.

During the period in which these proceedings were pending, as well as presently pending a disposition of this appeal, appellants have had a restraining order precluding the enforcement of the act. Accordingly, appellants have been able to continue to violate the law with immunity for a period in excess of two and one-half years. It would indeed be unfortunate to allow the proceedings in this Court to unnecessarily further delay the enforcement of this public act, particularly when the "alleged" Federal ques-

tion raised by appellants is clearly not debatable and entirely lacking in merit.

A consideration of the Jurisdictional Statement and Assignment of Errors reveals that appellants have misconceived the purpose of an appeal to this Court. Primarily, the appeal is sought for the purpose of obtaining a reconsideration of purely local questions. Appellants assert in the appeal, as they did in the State Courts, that Act No. 122 of the Michigan Public Acts of 1939 was not validly submitted under Section 3 of Article 17 of the Michigan Constitution, and that the portion of Section 1 pertaining to the appointment of members of the Michigan State Board of Dentistry violates the Michigan Constitution. Obviously, these matters do not confer jurisdiction upon this Court. It has been recognized by this Court that it will follow the decision of the State Supreme Court in matters involving the construction and application of a statute under the State Constitution.

Douglas v. *Noble* (1922), 261 U. S. 165;

Senn v. *Tile Layers Protective Union* (1936), 301 U. S. 468;

Wilson v. *State of North Carolina ex rel. Caldwell* (1897), 169 U. S. 586;

Palmer et al. v. *State of Ohio* (1918), 248 U. S. 32;

Memphis Street Railway Co. v. *Moore* (1916), 243 U. S. 299.

The only reference to any Federal question in the Jurisdictional Statement and Assignment of Errors which might possibly confer jurisdiction is appellants' assertion that Act No. 122 of the Michigan Public Acts of 1939, being an act to regulate the practice of dentistry, is outside the police power of the State and hence is in contravention of Section 1 of the 14th Amendment of the Constitution of the United

States. It is most significant that appellants have not in this proceeding or any of the proceedings presented a single case which supports this bare assertion.

A bare assertion that a Federal question is involved is not sufficient to confer jurisdiction upon this Court; the Federal question must be real and substantial and not frivolous or fictitious; and if questions upon which the jurisdiction depends are well settled by prior decisions, the appeal must be dismissed for want of jurisdiction.

Hamblin v. *Western Land Company* (1893), 147 U. S. 531;

New Orleans Waterworks Co. v. *Louisiana* (1902), 185 U. S. 336;

Patterson v. Standolind Oil & Gas Co. (1938), 305 U. S. 376;

Seaboard Air Line Railroad Co. v. *Watson* (1932), 287 U. S. 86;

Deming v. *Carlisle Packing Co.* (1912), 226 U. S. 102.

Appellants have failed to raise a substantial Federal question and the appeal should be dismissed.

This Court without exception has sustained the power of the State legislature to regulate dentistry under the police power notwithstanding the objection made that the regulations are contrary to the requirements of due process of law.

Semler v. *Oregon State Board of Dental Examiners* (1933), 294 U. S. 608;

Douglas v. *Noble* (1922), 261 U. S. 165;

Graves v. *Minnesota* (1926), 272 U. S. 425;

Dent v. *West Virginia* (1888), 129 U. S. 114.

This Court has also sustained the right of the state under the police power to regulate the practice of dentistry for

the purpose of insuring the personal relation between the dentist and his patient.

Miller v. *State Board of Dental Examiners of Colorado et al.* (1932), 287 U. S. 563;

Approving—*State Dental Examiners* v. *Miller,* 290 Colo. 193, 8 Pac. (2d) 699.

In view of the fact that a State statute is to be considered in the light of the principle that a State legislature is the primary judge of the regulations enacted in the interest of the welfare and safety of the people and police statutes can be held unconstitutional only where they are arbitrary or unreasonable attempts to exercise this power, it is apparent that Act 122 of the Michigan Public Acts of 1939 does not involve any Federal questions which have not already been passed upon by this Court. As a matter of fact, appeals involving substantially the same questions have been recently dismissed by this Court on the ground that no substantial Federal question was involved.

Brown v. *Commonwealth of Massachusetts* (1939), 308 U. S. 504;

Approving—*Brown* v. *Commonwealth of Massachusetts,* 20 N. E. (2d) 478;

Orwitz v. *Board of Dental Examiners of California* (1940), 313 U. S. 546; approving 41 Cal. App. (2d) 653, 107 Pac. (2d) 407.

In conclusion, inasmuch as the Jurisdictional Statement and Assignment of Errors of appellants primarily involve the construction of a State statute under a State Constitution and present no substantial Federal question, it is re-

spectfully submitted that this Court does not have jurisdiction to entertain the appeal.

Respectfully submitted,

HERBERT J. RUSHTON,
Attorney-General for the State of Michigan,
By EDMUND E. SHEPHERD,
Solicitor-General for the State of Michigan,
Attorneys for Michigan State Board of Dentistry;
CLARK, KLEIN, BRUCKER & WAPLES,
WILBER M. BRUCKER,
ROBERT A. SULLIVAN,
Attorneys for Michigan State Dental Society.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1245

JOHN C. TOOLE, JOSEPH R. APPLEGATE, RAYMOND DIX, CLARENCE M. McARTHUR, J. BAIN McGILVRAY, GORDON B. SULLIVAN, HENRY STRUIK, MILFORD GOLDEN, MORRIS L. BOTWIN, ERNEST R. RICE, PLYN EARLE, WILLIAM K. MEADE, JOSEPH FORBES, ABRAHAM C. LANE, WILLIAM G. ZIEVE, IRVING E. GORDON, SAMUEL CROWELL (CROLL), SAMUEL T. WINSHALL, HORACE L. DIAMOND, CURTIS C. BUSH, IRVING C. RIFKIN, AND MILO D. RATHBUN,

Plaintiffs & Appellants,

vs.

MICHIGAN STATE BOARD OF DENTISTRY, HARRY T. WOOD, CHARLES BARIBEAU, BOYD KELLEY, JAMES F. SPENCER, WILLIAM J. B. MASON AND G. G. JACOBS, AND MICHIGAN STATE DENTAL SOCIETY,

Defendants & Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN.

MOTION FOR DISMISSAL OF APPEAL OR, IN THE ALTERNATIVE, AFFIRMATION OF THE DECISION OF THE MICHIGAN SUPREME COURT.

To the Supreme Court of the United States:

Now comes the Michigan State Board of Dentistry and its members, appellees, by the Attorney-General for the

State of Michigan, and Michigan State Dental Society, intervening appellees, by Clark, Klein, Brucker & Waples, and respectfully represent as follows:

1. That under date of March 28, 1942, the court entered an order allowing an appeal from the decree of the Supreme Court of the State of Michigan in the case of *Toole, et al.* v. *Michigan State Board of Dentistry* (1942), 300 Mich. 180, in which case the Michigan Supreme Court sustained the constitutionality of Act 122 of the Michigan Public Acts regulating the practice of dentistry in the State of Michigan.

2. That the Assignments of Errors and Jurisdictional Statement show that the appeal is based primarily upon the construction of said Act 122 under the Michigan Constitution, which matters are outside the jurisdiction of this Court.

3. That none of the Federal questions raised in said Assignment of Errors and Jurisdictional Statement are of substantial nature, sufficient to confer jurisdiction upon this Court.

4. That if the appeal involves any substantial Federal questions, these were properly decided by the Supreme Court for the State of Michigan and its decision should be affirmed.

5. That the appeal involves a Public Act containing criminal penalties and was filed primarily for delay.

WHEREFORE, it is respectfully requested that the appeal be dismissed or, in the alternative, the decision of the Supreme Court of Michigan be affirmed.

Respectfully submitted,

HERBERT J. RUSHTON,
Attorney-General for the State of Michigan,
By EDMUND E. SHEPHERD,
Solicitor-General for the State of Michigan,
Attorneys for Michigan State Board of Dentistry;
CLARK, KLEIN, BRUCKER & WAPLES,
WILBER M. BRUCKER,
ROBERT A. SULLIVAN,
Attorneys for Michigan State Dental Society.

No. 1245. TOOLE ET AL. *v.* MICHIGAN STATE BOARD OF DENTISTRY ET AL. Appeal from the Supreme Court of Michigan. June 1, 1942. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Semler* v. *Dental Examiners*, 294 U. S. 608, and cases cited. *Mr. Edward N. Barnard* for appellants. *Messrs. Herbert J. Rushton*, Attorney General of Michigan, and *Wilbur M. Brucker*, for appellees. Reported below: 300 Mich. 180, 1 N. W. 2d 502.